

OFFICE OF THE GENERAL COUNSEL  
Division of Operations-Management

MEMORANDUM OM 96-74

October 31, 1996

TO: All Regional Directors, Officers-in-Charge,  
and Resident Officers

FROM: B. Allan Benson, Acting Associate General Counsel

SUBJECT: Cleveland Real Estate Partners, 316 NLRB 158 (1995), enforcement  
denied, No. 95-5534 (6th Cir., September 13, 1996)

In Cleveland Real Estate Partners, 316 NLRB 158 (1995), enf. denied, No. 95-5534 (6th Cir., September 13, 1996), the Court of Appeals rejected the Board's position that an employer may not forbid nonemployee union representatives from distributing "do-not-patronize" handbills on the property of a shopping mall where the employer permits such other nonemployee distribution by charitable groups soliciting for various causes, children's sales of products to support school activities and individuals soliciting signatures on political petitions. In the Court's view, the Board has given an unduly broad interpretation to the statement of the Supreme Court in NLRB v. Babcock & Wilcox, 351 U.S. 105, 112 (1956) that an employer may not "discriminate against the union by allowing other distribution" if it forbids distribution of literature by nonemployee union organizers on its property.<sup>1</sup> The Court asserted that the policies of Section 7 and the concern of the Supreme Court in Babcock and Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992) over property rights dictate that "the term 'discrimination' as used in Babcock means favoring one union over another, or allowing employer-related information while barring similar union-related information."

To facilitate assessment of our ongoing litigation strategy in cases involving the Babcock discrimination exception to employer rules precluding nonemployee access to their property in light of the adverse decision in Cleveland Real Estate please supply a list of all pending access cases which implicate the Babcock exception.<sup>2</sup> The list should include the current status of the case and a brief description of the Babcock discrimination exception issue as it arises in the case. It would be greatly appreciated if you can E-mail or fax your response to Joyce Van Horn by Friday, November 8. If you have any questions concerning these matters, please contact me or your Assistant General Counsel. Thank you for your cooperation.

B. A. B.

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<sup>1</sup> The Board's position is that the Babcock discrimination exception precludes an employer from barring a union's consumer-oriented picketing or handbilling while permitting consumer-oriented appeals by other outside groups that go beyond tolerating "isolated beneficent solicitation." Be-Lo Stores, 318 NLRB 1, 11 (1995).

<sup>2</sup> Please supply cases involving nonemployee access for organizational purposes as well as "do-not-patronize" and area standards handbilling.